

405 KAR 3:020. General provisions.

RELATES TO: KRS 350.151

STATUTORY AUTHORITY: KRS 350.151

NECESSITY, FUNCTION, AND CONFORMITY: KRS 350.151 requires the Environmental and Public Protection Cabinet to adopt rules and administrative regulations for the surface effects of underground coal mining. This administrative regulation sets forth general provisions which apply in this chapter with regard to applicability, compatibility, conflicting provisions, severability, obligations of operators, and reporting requirements.

Section 1. Applicability. The administrative regulations in this chapter shall apply to all surface operations for the underground mining of coal and all surface effects of underground coal mining conducted on or after May 3, 1978, and to any other lands used, disturbed, or redisturbed in connection with or to facilitate the underground mining of coal except:

- (1) The extraction of coal by a land owner for his own noncommercial use from land owned or leased by him;
- (2) The extraction of coal as an incidental part of federal, state or local government financed highway or other construction;
- (3) The extraction of coal in any operation or activity in which are extracted 250 tons or less of coal within a period of twelve (12) consecutive calendar months; and
- (4) The extraction of coal incidental to the extraction of other minerals where coal does not exceed sixteen and two-thirds ($16 \frac{2}{3}$) percent of the total mineral tonnage extracted for commercial use or sales.

Section 2. Compatibility with PL 95-87. The provisions of this chapter are to be construed as compatible with federal regulations adopted pursuant to PL 95-87, the "Surface Mining Control and Reclamation Act of 1977;" and the cabinet may amend the administrative regulations of this chapter to achieve conformity and compatibility with such federal regulations.

Section 3. Conflicting Provisions. The provisions of this chapter are to be construed as being compatible with and complimentary to each other. In the event that provisions within this chapter are found to be contradictory, the more stringent provisions shall apply.

Section 4. Severability. In the event that any provision or administrative regulation of this chapter is found to be invalid, the remaining provisions of this chapter shall not be affected nor diminished thereby.

Section 5. Obligations of Operators. (1) General obligations.

(a) No person or operator shall engage in surface operations of underground coal mining without having obtained from the cabinet a valid permit covering the area of land to be affected, except that underground mining operations existing on or before May 3, 1978, shall by August 3, 1978, make application to the cabinet for a permit pursuant to the provisions of 405 KAR 3:050.

(b) A person or operator engaged in surface operations of underground coal mining shall not throw, pile, dump or permit the throwing, piling, dumping or otherwise placing of any overburden, stones, rocks, coal, particles of coal, earth, soil, dirt, debris, trees, wood, logs, or any other materials or substances of any kind or nature beyond or outside of the area of land which is under permit and for which bond has been posted pursuant to KRS 350.151, nor place such materials herein described in such a way that normal erosion or slides brought about by natural physical changes will permit such materials to go beyond or outside of the area of land which is under permit and for

which bond has been posted pursuant to KRS 350.151.

(c) A person or operator engaged in surface operations of underground coal mining shall not engage in any operations which result in a condition or constitute a practice that creates an imminent danger to the health or safety of the public.

(d) A person or operator engaged in surface operations of underground coal mining shall not engage in any operations which result in a condition or constitute a practice that causes or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources.

(e) On or after May 3, 1978, any person or operator engaged in surface operations of underground coal mining shall comply with the requirements of this chapter, except when compliance with the requirements of this chapter would preclude compliance with the requirements of PL 95-87, August 3, 1977, the "Surface Mining Control and Reclamation Act of 1977," and regulations adopted pursuant thereto.

(f) Upon development of any emergency conditions which threaten the life, health or property of the public, the operator shall immediately notify the persons whose life, health or property are so threatened, shall take any and all reasonable actions to eliminate the conditions creating the emergency, and shall provide notice of the emergency conditions to the cabinet and to local law enforcement officials and appropriate local government officials. Any emergency action taken by an operator pursuant to this paragraph shall not relieve the operator of other obligations under this chapter or of obligations under other applicable local, state or federal laws and regulations.

(g) Compliance with the requirements of this chapter does not relieve any person or operator of responsibility for compliance with other applicable administrative regulations of the cabinet.

(2) Preexisting structures and facilities.

(a) Any preexisting, nonconforming structure or facility which is used in connection with or to facilitate the surface operations of underground coal mining on or after May 3, 1978, shall function in accordance with the requirements of this chapter.

(b) Any structures or facilities which must be reconstructed to meet the requirements of paragraph (a) of this subsection shall be reconstructed according to engineering plans prepared under the direction of a registered professional engineer. Upon completion of reconstruction the responsible engineer shall certify to the cabinet within fourteen (14) days thereafter, in a manner prescribed by the cabinet, that the reconstruction was performed in accordance with accepted engineering practices and in accordance with the design plans.

(c) In the case of sedimentation ponds or other impoundments proposed for reconstruction pursuant to paragraph (b) of this subsection, the responsible design engineer shall determine the structure hazard classification of the proposed reconstructed structure according to the classification descriptions in paragraph (d) of this subsection. For structures classified (B) - moderate hazard or (C) - high hazard, the operator shall obtain a permit from the cabinet, Division of Water Resources, pursuant to KRS 151.250 and administrative regulations adopted pursuant thereto, prior to reconstruction.

(d) Structure hazard classifications are as follows:

1. The following broad classes of structures are established to permit the association of criteria with the damage that might result from a sudden major breach of the structure:

a. Class (A); low hazard: structures located such that failure would cause loss of the structure itself but little or no additional damage to other property. Such structures will generally be located in rural or agricultural areas where failure may damage farm buildings other than residences, agricultural lands, or county roads.

b. Class (B); moderate hazard: structures located such that failure may cause significant damage to property and project operation, but loss of human life is not envisioned. Such structures will generally be located in predominantly rural agricultural areas where failures may damage isolated

homes, main highways or major railroads, or cause interruption of use or service of relatively important public utilities.

c. Class (C); high hazard. This classification must be applied for structures located such that failure may cause loss of life, or serious damage to homes, industrial or commercial buildings, important public utilities, main highways or major railroads. This classification must be used if failure would cause probable loss of human life.

2. The responsible engineer shall determine the classification of the structure after considering the characteristics of the valley below the site and probable future development. Establishment of minimum criteria does not preclude provisions for greater safety when deemed necessary in the judgment of the engineer. Considerations other than those mentioned in the above classifications may require that the established minimum criteria be exceeded. A statement of the classification established by the responsible engineer shall be clearly shown on the first sheet of the drawings.

3. When structures are spaced so that the failure of an upper structure could endanger the safety of a lower structure, the possibility of a multiple failure must be considered in assigning the structure classification of the upstream structure.

Section 6. Reporting Requirements. (1) Annual report of mining and reclamation. Any operator or person holding a valid permit for surface operations of underground coal mining pursuant to KRS 350.151 and this chapter shall submit, in a form and manner prescribed by the cabinet, a report of all surface operations and reclamation operations conducted pursuant to the permit in the preceding twelve (12) month period. Such report shall be submitted not later than thirty (30) days after the end of each anniversary date of the permit. However, when the operator requests renewal of the permit pursuant to Section 8 of 405 KAR 3:050, and such information as is required in this subsection has been provided in the request for renewal, the requirement for such report for the preceding twelve (12) month period shall be deemed satisfied. Such report shall contain, but shall not be limited to the following information:

- (a) The identification of the operation;
 - (b) Such maps as may be required by the cabinet;
 - (c) The area of land disturbed, backfilled and regraded;
 - (d) The area of land planted or seeded;
 - (e) The type of planting or seeding, including mixtures and rates of application of plants, seed, lime, fertilizers, inoculants and other agents;
 - (f) The dates of planting or seeding;
 - (g) The condition of all sediment ponds, impoundments, disposal areas for excess rock and earth materials, and disposal areas for waste materials;
 - (h) Such additional information as the cabinet may require;
 - (i) Such reports shall be certified by the operator as to accuracy.
- (2) Other reports required. The operator shall submit such other reports, documentation, certifications, or other information as the cabinet may require, or as may be required by KRS Chapter 350 and administrative regulations adopted pursuant thereto.

Section 7. Hearing. (1) Except for permit hearings pursuant to KRS 350.090(1), any person aggrieved by the actions of the cabinet pursuant to subsection (3) of this section may by written notice request that a hearing be conducted by the cabinet. The right to demand such a hearing shall be limited to a period of thirty (30) days after the applicant has had actual notice of the action, or could reasonably have had such notice. The cabinet shall schedule a hearing before the cabinet not more than twenty-one (21) days after notice of demand for such a hearing, unless the person complained against waives in writing the twenty-one (21) day period. The notice of hearing shall include a statement of the time, place, and nature of the hearing; the legal authority for the hearing; reference to

the statutes and administrative regulations involved; and a short statement of the reason for the granting of the hearing.

(2) Prior to the formal hearing, and upon seven (7) days written notice to all parties, delivered personally or by certified mail, return receipt requested, the hearing officer may hold a prehearing conference to consider simplification of the issues, admissions of fact and documents which will avoid unnecessary proof, limitations of the number of witnesses and such other matters as will aid in the disposition of the matter. Disposition of the matter may be made at the prehearing conference by stipulation, agreed settlement, consent order, or default for nonappearance.

(3)(a) Any party to a hearing may be represented by counsel, may make oral or written argument, offer testimony, cross-examine witnesses, or take any combination of such actions. A hearing officer shall preside at the hearing, shall keep order, and shall conduct the hearing in accordance with reasonable administrative practice.

(b) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. When necessary to ascertain facts not reasonably susceptible of proof under judicial rules of evidence, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Hearing officers shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form. Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original. A party may conduct cross-examinations required for a full and true disclosure of the facts. Notice may be taken of generally recognized technical or scientific facts within the cabinet's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data and they shall be afforded an opportunity to contest the material so noticed. The cabinet's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

(c) It will be within the hearing officer's discretion to require official transcripts or to set up other procedures for taking evidence, including but not limited to the use of mechanical recording devices for recording the testimony. The record of such hearing, consisting of all pleadings, motions, rulings, documentary and physical evidence received or considered, a statement of matter officially noticed, questions and offers of proof, objections and rulings thereon, proposed findings and recommended order, and legal briefs, shall be open to public inspection and copies thereof shall be made available to any person upon payment of the actual cost of reproducing the original except as provided in KRS 224.035.

(d) The hearing officer shall within thirty (30) days of the closing of the hearing record make a report and a recommended order to the secretary. The order shall contain the appropriate findings of fact and conclusions of law. If the secretary finds upon written request of the hearing officer that additional time is needed, then the secretary may grant a reasonable extension. The hearing officer shall serve a copy of his report and recommended order upon all parties. The parties may file within seven (7) days of service of the hearing officer's report and recommended order exceptions to the recommended order. The secretary shall consider the report and recommended order and exceptions. The secretary may remand to the hearing officer the matter for further deliberation, adopt the opinion of the hearing officer as the cabinet's or issue his own written order based on the report and recommended order. The secretary shall act within twenty (20) days of the deadline for filing exceptions, unless extensions of time have been granted to the hearing officer, pursuant to paragraph (e) of this subsection.

(e) After completion of the hearing and filing of exceptions, the cabinet shall notify the applicant in

writing, certified mail, return receipt requested, of the final decision of the cabinet. If any extension of time is granted by the secretary for a hearing officer to complete his report, the cabinet shall notify all parties at the time of the granting of the extension. Parties shall have seven (7) days to file exceptions to the report and recommended order if such an extension is granted.

(f) The secretary shall not grant extensions of time to the hearing officer for more than thirty (30) days for any one (1) extension, and no more than two (2) such extensions shall be granted.

(g) A final order of the cabinet shall be based on substantial evidence appearing in the record as a whole and shall set forth the decision of the cabinet and the facts and law upon which the decision is based.

(h) There shall be no ex parte communications between a hearing officer and parties to the action.

(i) Any person aggrieved by a final order of the cabinet may have recourse to the courts as set forth in KRS 224.085 and 350.032(2).

Section 8. Experimental Practices. In order to encourage advances in mining and reclamation practices or to allow postmining land use for industrial, commercial, residential, or public use (including recreational facilities), the cabinet may authorize departures in individual cases on an experimental basis from the provisions of this chapter, with the concurrence of the Secretary of the Department of the Interior. Such departures may be authorized if:

(1) The experimental practices are potentially more or at least as environmentally protective, during and after mining operations, as those required existing provisions in this chapter;

(2) The mining operations approved for particular land-use or other purposes are not larger or more numerous than necessary to determine the effectiveness and economic feasibility of the experimental practices; and

(3) The experimental practices do not reduce the protection afforded public health and safety below that provided by the provisions of this chapter. (4 Ky.R. 405; eff. 5-3-78; Am. 505; 5 Ky.R. 215; eff. 8-23-78; TAm eff. 8-9-2007.)